

5 MAY 1983

STAT NOTE FOR:
Chief, Logistics and Procurement Law
Division

STAT FROM:
Chief, Legislation Division

SUBJECT: Defense Production Act Amendments

John:

1. Having secured a six-month extension of the Defense Production Act, the Administration has returned to the task of revising the Act.

2. We have reviewed the attached draft legislation and find nothing objectionable. I would appreciate it if you would also take a look at it, particularly the cost accounting standards provision.

3. Please let me have your comments by 11 May, so I can let OMB know our views.

STAT

File: Technology Transfer/Defense Industrial Base



Federal Emergency Management Agency

Washington, D.C. 20472

DRAFT

Lamb

Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Enclosed is draft legislation "To amend the Defense Production Act of 1950 to support the mobilization of the defense industrial base of the United States" and "Supporting Rationale."

It is requested that this legislation be introduced and referred to an appropriate committee.

The Office of Management and Budget advises that there is no objection from the standpoint of the Administration's program to the submission of this legislative proposal for the consideration of the Congress.

Sincerely,

George Jett
General Counsel

Enclosures

A BILL

To amend the Defense Production Act of 1950 to support the mobilization of the defense industrial base of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, .

SHORT TITLE

SECTION 1. This Act may be cited as the "Defense Production Act Amendments of 1983".

DECLARATION OF POLICY

SECTION 2. Section 2 of the Defense Production Act of 1950 (50 U.S.C. App. 2062) is amended to read as follows:

"SEC. 2.(a)(1) In view of the present international situation, the Nation's growing reliance on imports of materials and components, and the need for measures to reduce defense production lead times and bottlenecks, and in order to provide for the national defense and national security, our defense mobilization preparedness effort requires the development of preparedness programs, defense industrial base improvement measures, and the expansion of domestic productive capacity and supply beyond the levels needed to meet the civilian demand. Also required is some diversion of certain materials and facilities from civilian use to military and related purposes.

"(2) These activities are needed in order to improve defense industrial base efficiency and responsiveness, to reduce the time required for industrial mobilization in the event of an attack on the United States or

to respond to actions occurring outside the United States which could result in the termination or reduction of the availability of strategic and critical materials, including energy, and which could adversely affect the national defense preparedness of the United States. In order to insure the national defense preparedness which is essential to national security, it is also necessary and appropriate to assure the availability of domestic energy supplies for national defense needs.

"(b)(1) In order to insure productive capacity in the event of an attack on the United States, it is the policy of the Congress to encourage the geographical dispersal of the industrial facilities of the United States in the interest of the national defense, and to discourage the concentration of such productive facilities within limited geographical areas which are vulnerable to attack by an enemy of the United States.

"(2) In the construction of any Government-owned industrial facility, in the rendition of any Government financial assistance for the construction, expansion, or improvement of any industrial facility, and in the production of goods and services, under this or any other Act, each department and agency of the executive branch shall apply, under the coordination of the Federal Emergency Management Agency, when practicable and consistent with existing law and the desirability for maintaining a sound economy, the principle of the geographical dispersal of such facilities in the interest of national defense. However, nothing in this paragraph shall preclude the use of existing industrial facilities.

"(3) To ensure the adequacy of productive capacity and supply, executive agencies and departments responsible for defense acquisition shall continuously assess the capability of the defense industrial base to satisfy near-term

requirements as well as increased mobilization production requirements. Such assessments shall specifically evaluate the availability of adequate production sources, including subcontractors and suppliers, materials, and skilled labor, and professional and technical personnel.

"(4) It is the policy of the Congress that plans and programs to carry out this declaration of policy shall be undertaken with due consideration for promoting efficiency and competition."

EXPANSION OF PRODUCTIVE CAPACITY AND SUPPLY

SECTION 3. Section 301 of the Defense Production Act of 1950 (50 U.S.C. App. 2091) is amended--

- (a) in subsection (e)(1)(A), by striking out "38,000,000" and inserting in lieu thereof "50,000,000";
- (b) in subsection (e)(1)(B)--
 - (1) by striking out "60 days" and inserting in lieu thereof "20 days";
 - (2) by striking out "60-day period" each place it appears therein and inserting in lieu thereof "20-day period";
 - (3) by inserting "(i)" after "such proposed obligation and"; and
 - (4) by striking out the period at the end of the first sentence thereof and inserting in lieu thereof the following: "or
(ii) both Houses of Congress adopt a concurrent resolution approving such obligation. If the Congress adopts such a concurrent resolution, the guarantee involved may be made at any time after the date on which such concurrent resolution is adopted."

SECTION 4. Section 302 of the Defense Production Act of 1950 (50 U.S.C. App. 2092) is amended--

- (a) by striking out "60 days" and inserting in lieu thereof "20 days";
- (b) by striking out "60-day period" each place it appears therein and inserting in lieu thereof "20-day period"; and
- (c) in the second sentence thereof--

- (1) by inserting "either (A)" after "such proposed loan and"; and
- (2) by striking out the period at the end thereof and inserting in lieu thereof the following:

→ "or (B) both Houses of Congress adopt a concurrent resolution approving such loan. If the Congress adopts such a concurrent resolution, the loan involved may be made at any time after the date on which such concurrent resolution is adopted."

SECTION 5. Section 708A of the Defense Production Act of 1950 (50 U.S.C. App. §2158A) is hereby repealed.

GENERAL PROVISIONS

SECTION 6. Section 101(a) of the Defense Production Act of 1950 (50 U.S.C. App. 2071) is amended by inserting ",services" after "(2) to allocate materials".

SECTION 7. Section 101(c) of the Defense Production Act (50 U.S.C. App. 2071) is amended by inserting "services," after "relating to,".

SECTION 8. Section 702(b) of the Defense Production Act of 1950 [50 U.S.C. App. 2152 (b)] is amended to read as follows: "(b) The word materials shall include raw materials, articles, commodities, components, equipment, munitions, processes, products, supplies, systems, and technical information."

SECTION 9. Section 703(b) of the Defense Production Act of 1950 (50 U.S.C. App. §2153) is hereby repealed.

SECTION 10. Section 705(e) of the Act be amended by inserting after the words "...person furnishing such information shall..." the following:
"be exempt from public disclosure under 5 U.S.C. 522(b)(3)(B) and shall..."

SECTION 11. The second paragraph of Section 705(e) of the Defense Production Act of 1950 (50 U.S.C. App. §2155) is hereby repealed.

SECTION 12. Section 711(a)(1) of the Defense Production Act of 1950 (50 U.S.C. App. §2161) is amended by striking out "Bureau of the Budget" and inserting "Office of Management and Budget", in lieu thereof.

SECTION 13. Section 716 of the Defense Production Act of 1950 (50 U.S.C. App. 2165) is amended by striking out "\$1,000" and inserting "\$10,000" in lieu thereof.

SECTION 14. The first sentence of section 717(a) of the Defense Production Act of 1950 (50 U.S.C. App. 2166(a)) is amended by striking out "September 30, 1983" and inserting in lieu thereof "September 30, 1988".

SECTION 15. Section 719 of the Defense Production Act of 1950 (50 U.S.C. App. 2168) is amended to read as follows:

"COST ACCOUNTING STANDARDS

"SEC. 719. (a) Cost accounting standards shall be used by all relevant Federal agencies and by defense contractors and their subcontractors in estimating, accumulating, and reporting costs in connection with the pricing, administration, and settlement of all negotiated

prime contract and first-tier subcontract national defense contracts with the United States in excess of \$500,000, other than contracts or subcontracts where the award is based on --

"(1) established catalog or market prices of commercial products;

"(2) prices set by law or regulation; or

"(3) adequate price competition.

"(b) All standards, rules, and regulations issued by the Cost Accounting Standards Board, and in effect on the day prior to the effective date of the Defense Production Act Amendments of 1983, shall remain in effect and be subject to the provisions of this section. These standards, rules, and regulations shall have the force and effect of duly promulgated regulations.

"(c) All exemptions, waivers, and other actions by the Cost Accounting Standards Board in connection with any function transferred by this section, and in effect at the time of the transfer, shall remain in effect to the same extent as if such transfer had not occurred, until amended or rescinded by the Director of the Office of Management and Budget.

"(d) The Director of the Office of Management and Budget (hereinafter referred to as the 'Director') shall have the authority to take such action as the Director determines necessary to ensure --

"(1) that the standards, rules, regulations, and interpretations

issued by the Cost Accounting Standards Board are consistent with sound accounting principles and provide for accurate, fair, and equitable cost determinations; and

"(2) that such standards, rules, regulations, and interpretations conform to procurement policies, regulations, procedures, or

forms promulgated pursuant to the Office of Federal Procurement Policy Act and other Government procurement authorities. In performing such function, the Director is authorized to amend or rescind the standards, rules, regulations, or interpretations issued by the Cost Accounting Standards Board.

"(e) (1) Prior to the amendment or rescission of any standard, rule, or regulation under this section, the Director shall publish in the Federal Register notice of the action proposed to be taken, together with a report concerning such proposal. All parties affected thereby shall be afforded a period of not less than ninety days after such publication in which to submit their views and comments with respect to the proposed action.

"(2) The Director shall give full consideration to the views and comments submitted before making any final amendment or rescission. A final amendment or rescission may not become effective prior to the expiration of ninety days after final publication in the Federal Register.

"(f) The publication required by subsection (e)(1) shall contain, with respect to the proposal --

"(1) a full description of such proposal;

"(2) a summary of the reasons for such proposal; and

"(3) an assessment of the probable costs of implementation relative to the probable benefits of such proposal, including an analysis of --

"(A) the effects of such proposal on inflation;

"(B) the advantages and improvements in the pricing, administration, and settlement of contracts which will result from

such proposal; and

"(C) the effect of such proposal on contract prices.

- "(g) The Director is authorized to exempt from the requirements of this section such classes or categories of defense contractors or subcontractors under contracts negotiated in connection with national defense procurements as the Director determines, on the basis of the size of the contracts involved, nature of the contractor's business, or otherwise, are appropriate, consistent with the purposes sought to be achieved by this section.
- "(h) The Director is authorized to waive the requirements of this section.
- "(i) For the purpose of determining whether a defense contractor or subcontractor has complied with duly promulgated costs accounting standards and has followed consistently his disclosed cost accounting practices, any authorized representative of the head of the agency concerned or of the Comptroller General of the United States shall have the right to examine and make copies of any documents, papers, or records of such contractor or subcontractor relating to compliance with such cost accounting standards and principles.
- "(j) With respect to any function that may be transferred by this section and exercised after the effective date of this section, reference to any other Federal law or regulation to the Cost Accounting Standards Board shall be deemed to mean the Director.
- "(k) The assets, liabilities, contracts, property, and records of the Cost Accounting Standards Board are hereby transferred to the Director.
- "(l) The standards, rules, and regulations made effective under this section shall be incorporated into a single, Government-wide procurement regulation not later than September 30, 1984. When such regulation

becomes effective, the provisions of this section shall terminate.

SECTION 16. Section 720 of the Defense Production Act of 1950 (50 U.S.C. App. 2169) is hereby repealed.

Defense Production Act

Amendments of 1983

Supporting Rationale

April 1983

SECTION 1. Name of Act.

Rationale. These are the mobilization amendments of 1983.

SECTION 2. Update of Declaration of Policy.

Rationale. The Declaration of Policy was a call to action in the Korean War period. To meet the needs of the present international situation and to present a stronger basis for industrial mobilization preparedness, a more clear, concise and workable declaration of policy is necessary.

SECTION 3. Raising Threshold for Individual Loans and Reducing Congressional Review Period.

Rationale. Raising the threshold level for individual loans from \$38 million to \$50 million for Congressional review, lessens the trend toward micro management of programs by the legislative branch of Government and restores a degree of Executive discretion in the administration of defense production programs.

Cutting the Congressional review period from 60 days to 20 days will expedite the Congressional review of proposed projects and programs, and facilitate the early initiation of large critical projects and programs to expand defense production and resource supply.

SECTION 4. Reducing Congressional Review Period.

Cutting the Congressional review period from 60 days to 20 days will expedite the Congressional review of proposed projects and programs, and facilitate the early initiation of large critical projects and programs to expand defense production and resource supply.

SECTION 5. Repeal of Terminated International Energy Voluntary Agreement Authorities.

Rationale. The Energy Policy and Conservation Act of December 22, 1975, Section 252(h), provided:

"Upon the expiration of the 90-day period which begins on the date of enactment of this Act, the provisions of Sections 708 and 708A (other than 708A(o)) of the Defense Production Act of 1950 shall not apply to any agreement or action undertaken for the purpose of developing or carrying out (1) the international energy program, or (2) any allocation, price control, or similar program with respect to petroleum products under this Act or under the Emergency Petroleum Allocation Act of 1973. For purposes of Section 708A(o) of the Defense Production Act of 1950, the effective date of the provisions of this Act which relate to international voluntary agreements to carry out the International Energy Program shall be deemed to be 90-days after the date of enactment of this Act."

This amendment deletes from the DPA section 708A, which was superseded by section 252 of the EPCA as authority for the "Voluntary Agreement and

Plan of Action to Implement the International Energy Program." As subsection (a) of EPCA section 252 makes that section the sole authority for antitrust protection in connection with the International Energy Program (IEP), the similar provision in DPA section 708A(o) is superfluous for this purpose. Therefore, Section 708A is deleted in its entirety.

SECTION 6. Allocation of Services.

Rationale. Services are a primary attribute of the Nation's way of life, increasing many-fold in importance since 1950 at the time of passage of the DP Act. The need for, and availability of, all types and kinds of services is an essential facet of our national defense preparedness status. For example, the need for transportation, communications and health services are all vital elements in national defense.

SECTION 7. Service Contracting.

Rationale. Without this amendment, there may be no DPA authority for Strategic Petroleum Reserve (SPR) service contracting, as use of section 101(a) authority could subject all SPR contractors to defense-related Cost Accounting Standards.

SECTION 8. Amend Definition of Raw Materials.

Rationale. Accommodate Section 201 which specifies munitions component parts, supplies and equipment in addition to "materials." The appropriate method is to amend the definition of materials to include munitions since the other items are already covered in the definition. Systems have been added to the definition of materials to better include transportation and other service systems since the present definition includes processes but not systems.

SECTION 9. Repeals Terminated Title IV Authority.

Rationale. Title IV of the Act on Price and Wage Stabilization was terminated on April 30, 1953. Repeal of Section 703(b) on the heads and assistant heads of any independent agency to administer the authority conferred by Title IV of the Act is needed because the section is obsolete.

SECTION 10. Confidentiality of Information.

For over 25 years, under section 705(e) of the Act, the industrial community has had specific statutory assurance that information obtained under the Defense Production Act of 1950, as amended, (the Act) would be held on a confidential basis unless the President or his delegate determine that to withhold such information would be contrary to the interest of the national defense. The Freedom of Information Act of 1967 did not affect this statutory assurance of confidentiality since it provided protection for material specifically exempt from disclosure by statute.

However, section 5(b) of the Government in the Sunshine Act, amended the Freedom of Information Act, effective March 12, 1977, to allow the withholding of material specifically exempt from disclosure by statute only

where such statute: (1) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issues or (2) establishes particular criteria for withholding or refers to particular types of matters to withhold.

The amendment to the Freedom of Information Act (subsection 552(b)(3)) contained in the Government in the Sunshine Act raises serious questions concerning existing statutes as authority for protecting information. Providing a broad exemption from public disclosure of all information obtained under authority of the Act will eliminate the possibility of failing to identify, in a specific listing of information categories, types of information which should be protected from public disclosure.

The proposed amendment to section 705(e) of the Defense Production Act of 1950, as amended, is required in order to continue to assure the industrial community that identity of their markets, customers, suppliers, production utilization and capacity, share of markets, and the details of business transactions will continue to be held by the Government in confidence.

While it is true that certain exemptions to the Freedom of Information Act other than exemption three might be applicable to some information obtained under the Act, they may not protect all the sensitive information received by the Government in administering the Act. Release of trade and commercial information could reveal sensitive business information causing substantial damage to involved firms. This problem is aggravated by the fact that the sensitive company information is required to be submitted by law and penalties are provided for not submitting required information. Thus, it is only fair to the reporting entity that the Government provide adequate statutory assurances of confidentiality concerning the disclosure of information required to be provided under the Act.

SECTION 11. Repeals Terminated Title IV Authority.

Rationale. The Office of Price Stabilization no longer exists and Title IV Price and Wage Stabilization authorities expired on April 30, 1953. Repeal of the second paragraph of Section 705(e) on confidentiality of Office of Price Stabilization information is necessary because the section is obsolete.

SECTION 12. Update Agency Name.

Rationale. In section 711(a)(1) the Office of Management and Budget replaces Bureau of the Budget.

SECTION 13. Increase Penalties.

Rationale. Fines should reflect current financial realities and be sufficiently large to provide deterrence.

SECTION 14. Five-Year Extension of the Act.

Rationale. A 5-year extension of the Act is necessary to ensure continuity in these vital defense mobilization preparedness programs. An interruption of these authorities during this mobilization period will

have a disastrous impact on defense production and the cooperation of industry in meeting national defense needs.

A simple 5-year extension of the Defense Production Act will clearly demonstrate the national commitment to mobilization of the Nation's resources in an emergency. In addition, a 5-year extension of the Defense Production Act provides long-term continuity to defense preparedness programs, strengthens long-term preparedness planning, and demonstrates a firm national commitment to maintain the responsiveness of the defense industrial base.

The authorities in the Act are used on a daily basis for maintaining our defense posture. Contractors develop production schedules based on assurance of obtaining materials, components, and other necessities through extensions of priorities on their prime defense contracts. This results in benefit to taxpayers from the reduced costs of defense programs associated with shortened production lead times and maintenance of production schedules.

SECTION 15. Transfer Certain of the Authorities and Functions of the Defunct Cost Accounting Standards Board to the Director, Office of Management and Budget.

These authorities and functions were set out in Section 719 of the Defense Production Act. The Cost Accounting Standards Board fulfilled its mandate to establish cost accounting standards for defense contractors, but there are continuing functions required to be performed in maintaining the standards, including the amendment or modification of standards, granting of waivers for individual contracts, and establishing exemptions. These standards have the force and effect of law and must be followed. Thus, it is necessary to transfer the authority to exercise these functions and the authority to maintain, interpret, and administer these standards. This bill would transfer the function to the Director, Office of Management and Budget.

As modified, section 719(a) requires that the cost accounting standards shall be used by Federal agencies and by defense contractors and subcontractors in estimating, accumulating, and reporting costs in connection with the pricing, administration and settlement of all negotiated prime contract and subcontract national defense contracts in excess of \$500,000. Where the contract award is based on established catalog or market prices of commercial products, prices set by law or regulation, or adequate price competition, there is an exemption from application of this provision.

Current law does not provide an exception for contract awards based on adequate price competition. The Truth-in-Negotiations Act (Public Law 87-653) required prime contractors and subcontractors to submit cost and pricing data to the government in connection with the award of negotiated contracts or the pricing of contract modifications above a certain dollar threshold. That statute permits contractors and subcontractors to be exempt from this requirement where the price negotiated is based on adequate price competition. Accordingly, this exception would provide a uniform practice with regard to the pricing of government contracts.

Section 719(b) provides that all standards, rules, and regulations which were

issued by the Board and in effect before passage of this legislation shall remain in effect, subject to other provisions of this section. These standards, rules, and regulations shall have the force and effect of duly promulgated regulations, clarifying that the standards are to be made part of the appropriate government procurement regulations and are to be accorded the same legal status as those regulations.

Section 719(c) provides that all exemptions, waivers and other actions by the Cost Accounting Standards Board and in effect before passage of this legislation shall remain in effect, unless amended or rescinded by the Director of the Office of Management and Budget.

Section 719(d) authorized the Director of the Office of Management and Budget to take any actions necessary to ensure that (1) CAS Board standards, rules, regulations and interpretations are consistent with sound accounting principles and (2) such standards, rules, regulations, and interpretations conform to procurement, policies, regulations, procedures or forms promulgated pursuant to the Office of Federal Procurement Policy Act or other government procurement authorities. The Director is also authorized in this subsection to amend or rescind the standards, rules, regulations or interpretations issued by the Cost Accounting Standards Board.

Section 719(e) requires the Director to publish in the Federal Register notice of a proposed amendment or rescission to any cost accounting standard, rule, or regulation. Parties are given 90 days to comment on any such action, and the Director must give full consideration to such views before making a final amendment or rescission.

Section 719(f) sets forth the minimum content of each such publication.

Section 719(g) authorizes the Director to exempt classes or categories of defense contractors or subcontractors from the requirements of the Act, based upon the size of the contracts involved, the nature of the contractor's business, or on other considerations which are consistent with the purposes to be achieved by the Act.

Section 719(h) authorized the Director to waive the requirements of the Act.

Section 719(i) provides authorization for the agency concerned, or the Comptroller General of the United States, to examine the records of defense contractors and subcontractors to determine compliance with cost accounting standards and principles.

Section 719(j) provides that reference to the CAS Board in any other law shall be deemed to mean the Director of the Office of Management and Budget.

Section 719(k) transfers the assets, liabilities, contracts, property and records of the CAS Board to the Director of the Office of Management and Budget.

Section 719(l) states that the provisions of the Act, including any standards, rules, regulations made effective by the Act shall sunset on September 30, 1984, after incorporation into a government-wide procurement regulation, to assure that cost accounting standards are fully integrated into the existing system for

promulgation amendment, and rescission of procurement regulations.

SECTION 16. Repeal of Terminated National Commission on Supplies and Shortages.

Rationale. The Commission expired on March 31, 1977. Its functions are provided by the Departments of Commerce and Interior and FEMA.